JD(ATL)–11–15
Midland, TX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

TORQUE–IT–UP, LLC AND NORTH AMERICAN TUBULAR, LLC, JOINT EMPLOYERS AND/OR SINGLE EMPLOYER

and **CASE 16–CA–140455**

MICHAEL STILES, an Individual

Jonathan M. Elifson, Esq.
a*nd *Bryan Dooley, Esq.,
for the General Counsel.
Jessica Brown Wilson, Esq.
and ***Michael Maslanka, Esq.***
(Fisherbroyles, LLP), of Dallas, Texas,
for the Respondent.

BENCH DECISION AND CERTIFICATION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on May 6, 2014, in Midland, Texas. After the parties rested, I heard oral argument, and on May 8, 2015, issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1] The conclusions of law, remedy, order and notice provisions are set forth below.

1 The bench decision appears in uncorrected form at pp. 214 through 224 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as, "Appendix A" to this certification.

FURTHER DISCUSSION

1. Single–integrated enterprise

The complaint alleges that Torque–It–Up and North American Tubular are joint employers, and also alleges that they constitute a single–integrated business enterprise. At hearing, these two limited liability companies stipulated that they were joint employers and I so find. However, they did not admit the alleged single–employer status. Although it is a close question, I do not believe that the present record would support such a conclusion.

Single employer status is characterized by the absence of an arm's–length relationship among seemingly independent companies. In determining whether separate entities constitute a single employer, the Board examines the following four factors: (1) common ownership or financial control; (2) interrelation of operations; (3) common control of labor relations; and (4) common management. *Rogan Bros. Sanitation, Inc.*, 362 NLRB No. 61 (2015). All four factors need not be present and no one factor is controlling, although the Board considers common control of labor relations a "significant indication of single employer status." *Bolivar–Tees, Inc.*, 349 NLRB 720 (2007).

As to common ownership, an official of Respondent Torque–It–Up, Tracy Pesch (referred to in the complaint and by witnesses as Trace Pesch) testified that his stepfather, David Bridges[2] , owns Torque–It–Up and that his brother, David Bridges II, owns North American Tubular.

With respect to interrelation of operations, Pesch's prehearing affidavit states, in part, "Employees working for Torque–It–Up sometimes perform work for North American Tubular, and employees for North American Tubular sometimes perform work for Torque–It–Up." Employees of both companies shared the same lodging, a house in Hobbs, New Mexico. Pesch's affidavit states that the "Company" rented this house for the employees' use but the record does not reveal what arrangements exist, if any, for Torque–It–Up and North American Tubular to split this rental expense.

The record does not establish that the two companies have a common labor policy. At the least, it appears clear that employees of Torque–It–Up and North American Tubular received somewhat different compensation for overtime and travel expenses. Indeed, when Charging Party Stiles, employed by Torque–It–Up, discussed such compensation with employees of North American Tubular, it fomented the discontent which led to Stiles' discharge. In other respects, the record reveals little about how the two companies formulate and apply labor policies.

As to the fourth factor, common management, the evidence focuses on the role played by Pesch. employed by Torque–It–Up as its director of inspection services, quality assurance, safety, and training. Pesch reports directly to the owner, David Bridges, and described his duties as follows: "I write, train, and enforce safety procedures, inspection procedures, and quality assurance procedures." That description would be consistent with a management position outside the direct chain of command but it appears that Pesch may possess more line responsibilities than

2 In his prehearing affidavit, however, Pesch identified David Bridges as being his father, not his stepfather.

his title alone might suggest. Thus, Pesch made the decision to discharge Stiles. Moreover, he did so after consulting with Torque–It–Up's owner, David Bridges, whom he identified in his testimony as his stepfather.[3]

Pesch's brother, David Bridges II, owns North American Tubular. Because of the close familial relationship, it may be likely that Pesch exercises considerable authority in that Company as well as in Torque–It–Up, but the record does not establish the extent of such authority. The fact that Pesch discharged Stiles, a Torque–It–Up employee, does not provide a sufficient basis to conclude that Pesch possessed similar authority to terminate the employment of North American Tubular employees.

Pesch did refer to a director of operations, Tino Enriquez, but it is not clear whether Enriquez performed that function for both of the Respondents or just for Torque–It–Up. Absent further evidence concerning the management structure of both Respondents, any further conclusions regarding common management, or the absence of it, would be speculative.

In sum, the record does not rule out the possibility of a single–integrated enterprise and some evidence clearly would weigh in favor of such a finding. However, the present record does not suffice, in my view, to carry the Government's burden of proof on this issue.

Complaint paragraph 2(C) alleges that Torque–It–Up and North American Tubular constitute a single–integrated enterprise and complaint paragraph 2(D) alleges, in the alternative, that the two companies are joint employers. Although I do not find the two to be a single–integrated enterprise, I do conclude, based upon the Respondent's stipulation at hearing, that they are joint employers.

2. Protected activity

In their answer, the two Respondents deny that Stiles was discharged for activity protected by the Act and further deny that Stiles engaged in any such protected activity. To fall within the Act's protection, the conversation must satisfy two requirements. It must constitute "concerted activity" and it also must be for the employees' "mutual aid and protection." *Summit Regional Medical Center*, 357 NLRB No. 134, slip op. at 3 (2011). However, the content of these standards cannot be gleaned simply from the dictionary meanings of the words in these terms of art. Rather, the Board's precedents define each of these two analytically distinct requirements. *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12 (2014).

From the testimony of various witnesses, two contrasting versions of the conversation emerge. Because different witnesses heard different parts of the conversation, the crediting of one version does not require discrediting the other. To the contrary, I find that during the course of the discussion, Stiles both spoke with employees about wages and other working conditions and also, as some witnesses testified, bragged that because of his training and experience, he would retain his job even after other employees had been laid off.

Based on Stiles' credited testimony, I find that the conversation began around 5 or 6 p.m.

[3] Pesch's prehearing affidavit identified Bridges as his father.

on October 8, 2014, when he and another worker were in the kitchen area of the house which Respondent had provided for their temporary lodging. Stiles identified the other employee, who did not testify, as Josh Peterson, but other evidence indicates that this person's name was Josh Peters. Here, I will refer to him as Peters.

Respondents Torque–It–Up and North American Tubular have admitted that they are joint employers but the record suggests that any particular member of the work crew receives his pay and benefits from one of these companies but not the other. The record also indicates that Torque–It–Up employees received somewhat different pay and benefits from those received by North American Tubular employees.

Although Torque–It–Up had hired Stiles, North American Tubular employed Peters. During their October 8, 2013 conversation, Peters described to Stiles various "small problems" within North American Tubular. According to Stiles, another North American Tubular employee, Roy Colvin, also was present. Stiles credibly testified:

> Q. What, specifically, did he say about the problems?
> A. He had addressed that they didn't possess a 40–hour minimum work week, as Torque–It–Up did, and that they had a different pay for their travel pay than Torque–It–Up.
> Q. What response did you have?
> A. I told him I didn't feel that was fair if they were both –the companies were both doing the same jobs, then they should be allotted the same pay.

Crediting Stiles, I find that he showed Peters his timesheet and that the two of them discussed overtime pay, travel pay, and the way the payroll department computed pay. Stiles further testified that Peters then revealed that he and Colvin had sought work elsewhere and were about to quit their jobs at North American Tubular:

> Q. What happened next?
> A. He was — Josh was definitely perturbed and then he said, well, we haven't told anybody this yet, but they — that day they had interviewed with another company called Byrd[4] and had filled out paperwork for new hire and did their little orientation and were actually quitting the next day to go work for Byrd. They had just not informed Trace yet, because they needed a place to stay for the night and didn't want to have to sleep in their truck.

The testimony of Roy Colvin generally corroborates that of Stiles. In a particularly salient part, Colvin quoted Stiles as telling the employees "we should stand up for ourselves . . . try to get what we could get . . ." Those words clearly urge group action by the employees. It is well–settled Board law that the activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much "concerted activity" as is ordinary group activity. *Cibao Meat Products*, 338 NLRB 934 (2003).

4 Other evidence in the record indicates that "Byrd" referred to Mike Byrd Casing Crews, another employer of oil field workers.

The concept of "mutual aid or protection" focuses on the goal of concerted activity; chiefly, whether the employee or employees involved are seeking to "improve terms and conditions of employment or otherwise improve their lot as employees. *Fresh & Easy Neighborhood Market, Inc.*, above, citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Here, the subjects discussed included compensation for overtime and travel and the administration of the payroll system. Such matters clearly fall within the scope of terms and conditions of employment and the employees' discussion of them constituted protected activity.

In sum, I reject the Respondent's defense that Stiles did not engage in any protected activity. To the contrary, I conclude that Stiles, on October 8, 2014, engaged in the protected, concerted activities alleged in complaint paragraph 6(A).

3. The appropriate analytical framework

The Board has established different frameworks for examining allegations of 8(a)(3) discrimination, depending on the circumstances. When an employer discharges an employee ostensibly for conduct unrelated to protected activity, the Board must determine whether an unlawful consideration – the protected activity of the employee or other employees – entered into the decisionmaking process and, if so, whether it affected the outcome of that process. In such situations, the Board follows the framework articulated in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) and its progeny.

In other cases, an employer's stated reason for discharging an employee concerns activity which itself falls within the Act's protection, or which is concurrent or intermingled with such protected activity. For example, an employer may have discharged a striking employee for asserted misconduct on a picket line. In such instances, a *Wright Line* analysis, focused on determining whether antiunion animus affected the discharge decision and, if so, how much, is not the right tool.

For example, in *Beverly Health & Rehabilitation Services*, 346 NLRB 1319 (2006), the respondent suspended an employee for discussing a pending grievance. That discussion itself constituted protected activity. The Board concluded that the *Wright Line* framework was inapplicable:

> It is clear that Spiess' discussion of a pending grievance was a form of Section 7 activity, and that she was suspended therefore. Thus, the appropriate inquiry is whether Spiess' use of profane language in the exchange with Myro during that discussion removed her from the protection of the Act. See, e.g., *Felix Industries*, 339 NLRB 195 (2003). To determine whether an employee who is otherwise engaged in protected activity loses the protection of the Act due to opprobrious conduct, the Board considers the following factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979).

Because the Respondents' asserted reason for discharging Stiles concerns his actions during activity which the Act protects, I conclude that the lawfulness of the discharge should be analyzed using the *Atlantic Steel* framework discussed above, rather than the *Wright Line* framework.

4. The Respondents' defense

The Respondents' answer avers that "Mr. Stiles[']s employment was terminated for a legitimate reason, unrelated to any protected rights under Section 7" and that "Even if Mr. Stiles did engage in alleged protected activity, Torque–It–Up, LLC would have terminated his employment because of the alternative legitimate business reasons." During oral argument, the Respondents' attorney stated:

> This is not a case about protected activity. And in fact, there is no evidence in this record that the decision–maker at the time of termination had any facts that Michael Stiles discussed wages. At the time of termination, the only evidence that Mr. Tracy Pesch, who was the decision–maker, had was that Michael Stiles, a six–foot–four, two–hundred–and–thirty–five–pound man, who was loud, who was agitated, who was articulated, was causing a disruption in the house.

To the extent that "loud" and "agitated" and "articulated" imply that Stiles was menacing or appeared to be out of control, the credited evidence simply does not support such a conclusion. The tone of voice which Respondents' characterized as "loud" and "agitated" could equally be called "forceful" and "impassioned," but applying adjectives does not resolve the issue of whether Stiles engaged in misconduct.

The discharge notice, set forth in the bench decision, stated that Stiles had created a distraction and a disruption and a "possible safety issue." Additionally, in an affidavit, Pesch had stated that Stiles had been discharged for creating an "unsafe work environment." However, Pesch admitted that, to his knowledge, Stiles had never threatened, touched, or hit anyone. Moreover, no testimony by any witness indicates that Stiles was threatening or menacing, and I find that he was not.

Certainly, Stiles did speak in an animated manner during this October 8, 2014 discussion. Indeed, he gave the appearance of being upset, but so did other employees. Colvin credibly described the mood as follows:

> Q. Do you remember how Michael Stiles was behaving during the conversation?
> A. Like I said, he was agitated, and well, he was — yeah, he was talking about — Michael was talking about we should stand up for ourselves, you know, try to get — try to get what we could get, you know, like — the same thing Torque–It–Up got, we should try to get that, but —
> Q. And would you say he was more agitated than anyone else in the room?

> A. Yes. Well, he got — well, he got — he was agitated, but I was agitated, too, and Josh Peters was kind of agitated. It just kind of spread. I think everybody got kind of — got a little upset.

Following the *Atlantic Steel* framework, I first consider the place of the discussion. Notwithstanding the statement in Pesch's affidavit that Stiles had created an "unsafe work environment," this conversation did not take place at the workplace but rather in the house where Stiles and other employees were lodging. Had Respondent paid for its employees' lodging at a hotel, that payment would not convert the hotel into a "workplace." Likewise, the fact that Respondent had leased the house in which the employees ate and slept while off duty does not convert the house into a "workplace." Rather, I conclude that this off–duty discussion took place in the functional equivalent of an employee's home. The first *Atlantic Steel* factor weighs in favor of finding Stiles' conduct protected by the Act.

The second *Atlantic Steel* factor concerns the subject matter of the discussion. The credited testimony establishes that Stiles was discussing the compensation he received as an employee of Torque–It–Up with other employees, some of whom were employed by the joint employer, North American Tubular. Clearly, such discussion constituted protected activity.

However, Stiles also made statements which offended some employees. They understood him to brag that in the event of a layoff, he would remain employed after others were laid off because of his past experience and education. It should be noted that a worker's vulnerability to layoff is such a significant aspect of the employment relationship that collective–bargaining agreements typically include provisions specifying the selection of employees for layoff and recall. Clearly, when Stiles expressed an opinion about who would be laid off, his words related to terms and conditions of employment and enjoyed the Act's protection. The fact that some employees felt annoyed or offended by Stiles' statements does not reduce the protection afforded by Section 7.

In that regard, let us assume briefly, for the sake of analysis, that Stiles' statements prompted some employees to resign their employment. Does the reason they reacted in that fashion affect the statutory protection? No. It does not matter whether the employees who quit did so because they were concerned about their job security or because Stiles' words, suggesting that he was more valuable to the Company than they were, offended them. Stiles' comments about the prospects for being laid off enjoyed the Act's protection regardless of the listeners' reactions.

To forfeit the Act's protection, an employee must engage in significant serious misconduct during the course of the protected activities, but Stiles' expression of an opinion about layoffs is not misconduct at all. The second *Atlantic Steel* factor, concerning the subject matter of the discussion, weighs in favor of finding Stiles' conduct protected.

The third and fourth *Atlantic Steel* factors concern "the nature of the employee's outburst" and "whether the outburst was, in any way, provoked by an employer's unfair labor practice." However, Stiles did not engage in any outburst.

The Respondent does try to characterize Stiles' words and actions as having the effect of an outburst, being a "disruption" and a "distraction," with an implication of intimidation. As noted above, Respondent's oral argument referred to Stiles as "a six–foot–four, two–hundred–and–thirty–five pound man, who was loud, who was agitated, who was articulated. . .causing a disruption in the house . . ." However, for reasons stated above and in the bench decision, I conclude that Stiles did not threaten or menace anyone, or even exceed the bounds of spirited discourse.

Respondents' broad–stroke, India ink attempt to depict Stiles as "The Hulk" simply fails to convince. Indeed, Pesch's own testimony does not establish even that other people had described Stiles as out of control. Pesch received his information about Stiles' behavior from Respondent's director of operations, Tino Enriquez, who did not testify. Pesch testified, in part, as follows:

> Q. What specifically was said to you about [Stiles'] behavior at the time?
> A. I was told that he was downstairs, creating a lot of mannerisms. His town[5] was raised, probably a lot louder than it should have been.

According to Pesch, another person who saw Stiles on this occasion, Harvey Ortiz, described Stiles as "kind of animated in his movements, a little more than what he felt he should have been." However, the phrases "creating mannerisms" and being "kind of animated" do not suggest someone who is menacing. If speaking in an animated way, with mannerisms, signaled dangerous instability, the public might have cause to fear that vast numbers of politicians were about to run amok.

In sum, all four *Atlantic Steel* factors support the conclusion that Stiles did not engage in any misconduct and that he did not lose the Act's protection. I so find. See *Fresh & Easy Neighborhood Market*, *Inc*., 361 NLRB No. 12 (2014).

5. The Respondent;s motivation

Persuasive evidence indicates that Pesch made the decision to discharge Stiles not out of any safety concern but because two other employees, Roy Colvin and Josh Peters, had decided to quit after hearing what Stiles had to say, and because Pesch feared that two other employees who heard Stiles might also resign.

From the record, it is not entirely clear whether Colvin and Peters went to another company and applied for employment before or after their conversation with Stiles.[6] In any event, they did not submit their resignations to Respondent until after talking with Stiles. Moreover, Respondent's manager Pesch learned about the resignations at the same time he learned about the employees' conversation with Stiles.

Respondent's director of operations, Tino Enriquez, phoned Pesch to inform him of the

---

5 The word "town" appears to be a mistranscription of "tone."

6 Stiles, describing his October 8, 2014 conversation with Colvin and Peters, quoted Peters as saying that he and Colvin had applied for work at a competing company, Byrd. However, Colvin's testimony indicates that he and Peters applied at Byrd *after* their conversation with Stiles.

resignations. According to Pesch, Enriquez "told me . . . that two individuals, Josh Peters and Roy Colvin, had walked out, they had already gone, and two more individuals, Cody Carter and Corry Pierce, were extremely upset, and getting ready to walk out, as well." Pesch further clarified that "walked out" meant that the employees had quit.

Pesch testified that all four of these individuals "were great employees, seasoned" and that he did not want to lose them. Moreover, the Respondents are subcontractors performing specialized services which have to be completed at a particular time in the construction of an oil well, so they must be able to send workers to a drilling location on short notice. As Pesch put it, "we keep a number of crews on call at all times, every day of the week, every month of the year . . ." The resignations diminished the pool of workers who could be dispatched.

After conferring with the Respondent's owner, Pesch decided to discharge Stiles. From Pesch's testimony, I conclude that he considered Stiles responsible and discharged him to prevent further resignations.

Nonetheless, Pesch persisted in seeking to justify Stiles' discharge on the grounds that Stiles' presence created some sort of potential safety problem. Thus, Pesch gave the following testimony:

> Q. Okay. Mr. Pesch, just so it's absolutely clear for all of us, why did you terminate Mr. Stiles?
>
> A. Because an uprising, a disruption, and proved to be a potential safety concern within the work place.

As discussed above, the "disruption" did not take place at the workplace and Stiles did nothing which reasonably would warrant a safety concern. However, Pesch also used the word "uprising."

The word "uprising" carries the connotation of people acting in concert. Already, Stiles had demonstrated the potential to foment discontent by engaging in discussion which the Act protects. I find that Respondent discharged him to prevent further protected activity of that kind. Additionally, I conclude that Pesch evicted him from the company–provided lodging as a further measure to prevent such discussion.

The fact that Pesch also sought to justify the discharge on safety grounds amounts to at least a slight departure from candor which leaves me with less confidence in his testimony than that given by Stiles. The testimony of these two witnesses conflicts with respect to one matter which is the subject of complaint paragraph 6(B), and I resolve this conflict by crediting Stiles.

5. Complaint paragraph 6(B)

Complaint paragraph 6(B) alleges that about October 8, 2014, Respondent, by Pesch, told employee Stiles not to discuss wages with coworkers. Stiles testified that Pesch gave this instruction in a telephone call after Stiles had the conversation with Peters and Colvin. Although Pesch admitted that he spoke with Stiles, he denied giving the instruction not to discuss wages.

Because I believe that Pesch was less than candid in characterizing Stiles' presence as a possible "safety issue," I have more confidence in the reliability of Stiles' testimony. Crediting Stiles, I find that Pesch did tell Stiles not to discuss wages. In reaching this conclusion, I also note that in a pretrial affidavit, Pesch admitted that he may have told Stiles and other employees that it was not a good idea to discuss their pay.

A rule prohibiting employees from discussing their wages is unlawful. *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992). Accordingly, I recommend that the Board find that Pesch, by instructing Stiles not to discuss his wages with other employees, violated Section 8(a)(1) of the Act.

6. Liability of North American Tubular

The complaint alleges, in the alternative, that Respondents Torque–It–Up and North American Tubular are joint employers and that they constitute a single–integrated enterprise. As discussed above, I have concluded that the Government has not proven that the Respondents are a single–integrated enterprise. However, based on their admission, I have found that they are joint employers.

Stiles worked for Respondent Torque–It–Up. Pesch made the decision to discharge Stiles after consulting with Torque–It–Up's owner, David Bridges. The question arises as to whether Pesch's action may be imputed to both Respondents.

At the outset, it may be noted that joint employer relationships vary considerably. For example, in *Capitol EMI Music, Inc.*, 311 NLRB 997 (1993), one of the joint employers simply supplied workers to the other employer but nothing more. The Board held that in such circumstances, the nonacting joint employer (which supplied the employees) would be held liable for an unlawful employee discharge only if the nonacting joint employer knew or should have known that the discharge was unlawful and acquiesced in the violation by failing to protest or resist it.

The present record indicates that the relationship between Torque–It–Up and North American Tubular is quite different. Both companies provide similar services in the oil fields. Pesch stated in his affidavit that employees "working for Torque–It–Up sometimes perform work for North American Tubular, and employees for North American Tubular sometimes perform work for Torque–It–Up." Because of these factual differences, I do not believe *Capitol EMI Music, Inc.* and its progeny to be controlling precedent here, but these cases do underscore the need to examine the specific facts carefully rather than automatically equating, and perhaps conflating, the concepts of joint employer and joint liability.

As noted, Stiles worked for Torque–It–Up and the official who discharged him, Pesch, worked for Torque–It–Up. At least at first glance, North American Tubular appears to have been standing on the sidelines, as it were, when the discharge occurred. Even though Torque–It–Up has a joint employer relationship with North American Tubular, is that relationship implicated here and, if so, how?

In determining whether Pesch's decision to discharge Stiles may be imputed to North American Tubular, I first will consider whether the complaint has alleged that he is a supervisor and agent of that Company. The complaint's supervisory and agency allegations appear in its paragraph 5, which states as follows:

> At all material times, Trace Pesch held the position of Respondent's Director of Inspection Services, Quality Assurance, Safety and Training and has been a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

Thus, although the complaint alleges Pesch to be a supervisor and agent of "the Respondent," it does not specify which Respondent. The use of the singular "Respondent" is consistent with the complaint allegation that Torque–It–Up and North American Tubular are a single–integrated enterprise, but a bit confusing in the context of the alternative allegation, that the two entities are joint employers. In view of my conclusion that the Government has not proven single–employer status, I must consider whether the complaint language alleging Pesch to be a supervisor and agent of "the Respondent" also alleges that he is a supervisor and agent of *each* of the Respondents.

The two Respondents filed a single answer which denied both the single–integrated–enterprise allegation and the joint–employer allegations, although they later admitted joint–employer status by stipulation at the hearing. With respect to the allegation in complaint paragraph 5, the Respondents' answer states as follows:

> Respondents admit that Trace Pesch held the position of Director of Inspection Services, Quality Assurance, Safety and Training for Torque–It–Up, LLC. Mr. Pesch had authority to hire and fire employees. Otherwise, Respondents admit the remaining allegations in paragraph 5.

The first two sentences thus admit only that Pesch is a supervisor and agent of Torque–It–Up, but the final sentence admits, without qualification, "the remaining allegations." Although the issue is not free from doubt, I conclude that, in the context of the Complaint as a whole, the language which alleges Pesch to be an agent of "the Respondent" reasonably would be understood to mean, and therefore effectively alleges, that Pesch is the agent of each of the Respondents. Similarly, I conclude that the complaint language was sufficient to place the Respondents on notice that the Government sought to prove that Pesch was an agent of North American Tubular, and thereby afforded the Respondents the opportunity to deny and contest such a relationship.

Next, I consider whether Pesch was acting as an agent of North American Tubular, as well as of Torque–It–Up, when he made and executed the decision to discharge Stiles. The record does not establish what duties, if any, Pesch customarily performed for North American Tubular. However, the evidence does indicate that when Pesch decided to discharge Stiles, he was attempting to "benefit" North American Tubular as well as Torque–It–Up.

As noted, employees of Torque–It–Up received somewhat different compensation than those of North American Tubular, and Stiles' October 8, 2014 conversation with other workers concerned these differences. In particular, Stiles spoke with Roy Colvin and Josh Peters, both of whom were employed by North American Tubular. After the discussion with Stiles, both Colvin and Peters submitted their resignations. These resignations both surprised and alarmed Pesch.

Pesch admitted that he also was concerned that two other employees, Corry Pierce and Cody Carter, might resign. He testified that all four – Colvin, Peters, Pierce, and Carter – were "great employees." Pierce, like Colvin and Peters, worked for North American Tubular. Of the four, only Carter was employed by Torque–It–Up.

Therefore, I conclude that Pesch discharged Stiles in an attempt to prevent further resignations from the workforce of North American Tubular and not just from the workforce of Torque–It–Up. In taking this action, Pesch was acting in the interest, as he perceived it, of both Respondents.

Section 2(13) of the Act states that in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. 29 U.S.C. § 152(13). I conclude that Pesch was acting as an agent of North American Tubular when he instructed Stiles not to discuss wages with other employees, when he discharged Stiles, and when he evicted Stiles from company lodging. Further, I conclude that Torque–It–Up, LLC and North American Tubular, LLC, are jointly and severally liable to remedy these unfair labor practices.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act, including posting the notice to employees attached hereto as Appendix B. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. *J. Picini Flooring*, 356 NLRB No. 9 (2010).

Additionally, Respondents must offer Stiles immediate and full reinstatement to his former position or, if that position is no longer available, to a substantially equivalent position, and make him whole, with interest, for all losses he suffered because of Respondents' unlawful termination of his employment. The make–whole relief shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

The Respondents also must (1) submit the appropriate documentation to the Social Security Administration (SSA) so that when backpay is paid, it will be allocated to the appropriate calendar quarters, and/or (2) reimburse the discriminatee(s) for any additional Federal and State

income taxes the discriminatee may owe as a consequence of receiving a lump–sum backpay award in a calendar year other than the year in which the income would have been earned had the Act not been violated. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

In sum, I recommend that the Board order a full make–whole remedy, with the monetary amounts to be calculated in accordance with the Board's established precedents. However, it appears that the Government may wish to place in issue a portion of the formula customarily used to compute the monetary liability and to litigate that issue at this stage in the unfair labor practice proceeding.

Specifically, complaint paragraph 10 states that the General Counsel seeks, as part of the remedy, "an order requiring that the Respondent reimburse Michael Stiles for all search–for–work and work–related expenses regardless of whether Stiles received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period." This complaint paragraph therefore concerns matters which, in the Board's bifurcated hearing process, come into focus during the compliance stage, after the issuance of a compliance specification defining the matters potentially in dispute.

Thus, Section 102.55 of the Board's Rules and Regulations provides that a compliance specification "shall specifically and in detail show, for each employee, the backpay periods broken down by calendar quarters, the specific figures and basis of computation of gross backpay and interim earnings, the expenses for each quarter, the net backpay due, and any other pertinent information." Because no compliance specification has issued, I do not consider complaint paragraph 10 to raise any issue ripe for litigation at this juncture, but instead will treat it as an announcement of the Government's desire to preserve the issue for resolution in the future.

CONCLUSIONS OF LAW

1. The Respondents, Torque–It–Up, LLC and North American Tubular, LLC, are joint employers and each is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by instructing employee Michael Stiles not to discuss his wages with other employees, by discharging him for discussing wages, hours, and working conditions with other employees, and by evicting him from lodging it had furnished him because he engaged in such protected activities.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

4. The Respondent did not engage in the unfair labor practices alleged in the complaint not specifically found herein.

On the findings of fact and conclusions of law, and on the entire record in this case, I issue the following recommended[7]

ORDER

The Respondents, Torque–It–Up, LLC and North American Tubular, LLC, joint employers, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Directing their employees not to discuss wages, hours, and working conditions with others.

(b) Discharging employees for discussing wages, hours, and working conditions with other employees or engaging in other concerted activities for their mutual aid or protection.

(c) Evicting employees from lodging furnished to employees because they engaged in activities protected by the Act.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self–organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer immediate and full reinstatement to employee Michael Stiles to his former position or, if that position no longer exists, to a substantially equivalent position and make him whole, with interest, for all losses he suffered because of the unlawful discrimination against him. The make–whole relief shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Respondent shall furnish lodging to Stiles if it provides such lodging to other members of the work crew to which he is assigned.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Michael Stiles and, within 3 days thereafter, notify Stiles in writing that this has been done and that the discharge will not be used against him in any way.

(c) Compensate the employee for any adverse tax consequences of receiving a lump–sum backpay award, and file a report with the Social Security Administration allocating the

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

backpay award to the appropriate calendar quarter for each employee.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at their offices and places of business in Midland, Texas, and at all other places where notices customarily are posted, copies of the attached notice marked "Appendix B."[8] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondents' authorized representatives, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, noticed shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondents customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB No. 9 (2010). In the event that, during the pendency of these proceedings, either Respondent has gone out of business, that Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 8, 2014.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated Washington, D.C. June 10, 2015

Keltner W. Locke
Administrative Law Judge

8 If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read, "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX A

BENCH DECISION

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. The credited testimony establishes that Respondent unlawfully terminated the employment of the Charging Party because he discussed wages and other terms and conditions of employment with fellow employees.

Procedural History

This case began on November 4, 2014, when Michael Stiles, the Charging Party, filed the initial unfair labor practice charge. Thereafter, the Charging Party amended the charge twice on January 30, 2015.

After an investigation, the Regional Director for Region 16 of the Board, issued a Complaint and Notice of Hearing on February 26, 2015. In doing so, the Regional Director acted for and with authority delegated by the Board's General Counsel. Both Respondents filed a single answer and thereafter amended it.

On May 6, 2015, a hearing opened before me in Midland, Texas. On that date, both sides rested after calling witnesses and introducing evidence. On May 7, 2015, counsel presented oral argument. Today, May 8, 2015, I am issuing this bench decision.

Admitted Allegations

In answering the complaint, and by stipulation during the hearing, the Respondents admitted certain allegations. Based on those admissions, I find that General Counsel has proven that the unfair labor practice charge was filed, amended and served as alleged. Further, I find that the Respondents, Torque–It–Up, LLC, and North American Tubular, LLC, are joint employers engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act, and that it is appropriate for the Board to assert jurisdiction in this matter.

Further, I find that Trace Pesch was, at all times material to this matter, the Director of Inspection Services, Quality Assurance, Safety and Training for Respondent Torque–It–Up, LLC, possessed the authority to hire and discharge employees, and was a supervisor and agent of Respondent Torque–It–Up, LLC, within the meaning of Sections 2(11) and 2(13) of the Act, respectively.

Background Facts

Both Respondents are contractors in the oil drilling industry and provide similar services. These services begin after a hole has been drilled in the ground for an oil well, and consist of lining the hole with casing which serves, in effect, as a pipe through which the oil flows to the surface. Modern drilling techniques often result in the hole descending straight down for a while and then bending to run in a direction almost parallel to the surface, so the installation of the

casing presents a challenge, particularly when the hole can extend for more than a thousand feet.

This work takes Respondents' employees to different locations as new wells are drilled in New Mexico, Oklahoma, Texas, and other places. Typically, these employees do not live close to the jobsites and their homes may be hundreds of miles away. The Respondents provide temporary lodging, relatively close to the jobsite, for the employees who will be working at that site.

The Respondents have leased a large house in Hobbs, New Mexico. It includes four bedrooms, three bathrooms, a kitchen and common areas the employees may use when not on duty. Typically, an employee will stay in this house for a 3–week stint while working at a jobsite.

Thus, the employees working on a particular oil field project are in close contact with one another, both on and off duty, for several weeks at a time, a situation in which human beings easily can begin to get on one another's nerves. Moreover, the job duties, involving the threading of the casing into the long hole, require close teamwork. Charging Party Stiles, a former Marine and veteran of the war in Iraq, described the working conditions as similar to a "deployment." In other words, the heavy, stressful work and the close proximity create a kind of crucible in which employees easily can become irritated and vexed.

The Alleged Unfair Labor Practices

The witnesses present two starkly different versions of events, and I must choose which testimony to believe. That is especially difficult because the two principal witnesses, Charging Party Stiles and Director of Inspection Services Pesch, both appeared to be quite credible witnesses. Casual observations of their demeanor while testifying afford little, if any clue as to which testimony more accurately reflects what happened. This decision relies heavily on the testimony of neutral witnesses who have no stake in the outcome.

The events in dispute took place at the house in Hobbs, New Mexico, on October 8, 2014. About 3 weeks earlier, Respondent Torque–It–Up had hired Stiles and had assigned him to a jobsite for what amounted to on–the–job training. During this period, Stiles was lodging, along with other crew members, at the house.

Stiles testified that on October 8, 2014, while at the house, he was talking with some other employees about wage rates when he received a call from Pesch, who told him not to discuss wages with other employees, and Stiles said he would not. According to Stiles, after the call, he engaged in further discussions with other employees about other working conditions. It may be noted that although employees of Torque–It–Up and North American Tubular sometimes worked together at the same jobsite, all of their terms and conditions of employment were not identical. Stiles testified that Pesch then called him again and discharged him for discussing wages notwithstanding Pesch's prior instruction not to do so.

Pesch's testimony, and his pretrial affidavit, which is in evidence, differ markedly. According to Pesch, late in the afternoon on October 8, 2014, he received a telephone call from one of the workers staying at the house.

In Pesch's affidavit, which is consistent with his testimony at the hearing, he gave the following description of what the caller had reported: "The caller said Stiles came in using certain mannerisms, tones, voices, body behavior, shouting, and pounding on tables. The caller said that, out of the blue, Stiles started saying things like 'You guys are on your way out,' 'They need me a lot more than I need you,' 'I am untouchable,' those kinds of statements."

After receiving this call, Pesch discussed the matter in phone calls with two workers, Corry Pierce and Harvey Ortiz. He described them as being upset and threatening to quit. Pesch stated in his affidavit that Pierce and Carter "had left the house and were getting ready to walk away if Stiles stayed. Two employees of North American Tubular quit after the conversation with Stiles. I believe their names are Josh Peters and Roy Colvin. I did not talk to Peters or Colvin about why they had quit."

Pesch decided to discharge Stiles. He testified that he notified Stiles of this decision on October 9, and also told him to leave the house. In a termination notice Pesch prepared 2 days later, Pesch stated as follows (capitalization as in original):

> STILES CREATED AND CAUSED A DISTRACTION AND DISRUPTION WITHIN THE WORKPLACE EFFECTING [sic] OTHER COMPANY EMPLOYEES. THIS CREATED A POSSIBLE SAFETY ISSUE WITH EMPLOYEES. STILES WAS INFORMED TO LEAVE THE PREMISES. NO ISSUED EQUIPMENT WAS TURNED IN FROM STILES. PAYROLL DEDUCTIONS WILL APPLY (SEE ATTACHED EQUIPMENT FORM(S). STILES IS NOT ELIGIBLE FOR REHIRE.

Pesch admitted on the witness stand that, to his knowledge, Stiles had never threatened or touched any employee.

In deciding which testimony to credit, I note that both Stiles and Pesch have an interest in the outcome of this proceeding. The testimony of neutral witnesses is particularly important. There were a number of such witnesses, workers who were employed by one of the Respondents at the time, but who are no longer employees. On October 8, 2014, they were lodging at the house in Hobbs, New Mexico, and heard at least part of what Stiles said.

Corry Pierce testified that Stiles was "mouthing off," saying that he had college degrees and military experience and that he would be the last person laid off. This statement annoyed Pierce, who had several years experience compared to Stiles' 3 weeks of experience. Irritated, Pierce walked outside.

Pierce compared Stiles' words to "poking a bear with a stick." However, I do not gather from Pierce's testimony that he or others feared for their safety. It is true, as the Respondent argues, that Stiles is 6 feet 4 inches tall, does body building as a hobby, and is a former Marine. However, the tenor of Pierce's testimony, and that of other witnesses, is not that they were afraid of Stiles but rather that they felt insulted by his assertion that his college degree and Marine Corps experience made him superior to them and would result in his retaining his job after they were laid off. More than once during his testimony, Pierce described Stiles as "acting like he's better than

everybody else," and Pierce's irritation was visible when he gave that testimony.

Pierce testified that he did not hear Stiles make any threats. He did refer to Stiles' "demeanor" but did not describe it as threatening or intimidating. Rather, I infer that Pierce considered Stiles unpleasant, perhaps haughty.

Respondent introduced into evidence an affidavit given by an employee, Cody Carter, to a Board investigator. Carter did not testify at the hearing, but his affidavit corroborates Pierce's testimony. Carter stated in his affidavit that he was in the living room and four or five men were in the kitchen talking. Their conversation became loud. One of them called to Carter to come in and listen. Carter further stated:

> When I went in, Stiles was talking about how he had some kind of degree that had him set up in the company, and that the Employer was going to lay off or fire everyone in the company before him, and that he knew this for a fact This is the only thing I heard from Stiles. This made me mad, so Corry and I both walked out to the front yard. We were both mad because Stiles was saying some stupid shit. I was in the kitchen for less than five minutes. About five minutes later Josh Peters came out with his relief hand, his first name is Roy, and they were really hot. I'm pretty sure they quit right after that. I don't think they told me why they quit. I'm pretty sure they were mad at Stiles because of what he was saying, because it was starting to get a little heated when I went in there but I don't know for sure. They said they were going to talk to the manager at Mike Byrd Casing Crews. Nobody was violent or aggressive during the conversation in the house, it was just words.

Another witness no longer employed by Respondent, Derek Herndon, gave testimony corroborating Carter. Herndon described Stiles as wanting to be "the man," that is, lording it over the others and claiming that he would be retained when the others were laid off. However, Herndon's testimony does not establish that Stiles acted in a threatening manner or otherwise evoked fear, as contrasted to irritation and anger.

On the other hand, another witness to the discussion, Roy Colvin, testified that Stiles was somewhat loud but that other people were loud, too. Colvin did not testify that Stiles said anything about his college degree or experience but instead indicated that the discussion concerned wages and terms of employment. Colvin became angry but it appears that it was not at Stiles but rather concerned his wages and other terms of employment. Colvin had been in touch with another employer, then quit his job after listening to this discussion. Considering Colvin's lack of interest in the outcome of this proceeding and after observing his demeanor as a witness, I credit his testimony.

Further, I conclude that the differences in the testimony arise because each witness only heard part of the conversation. Based on the credited testimony of these neutral witnesses, I find that Stiles did make remarks claiming that he would be retained when the others were laid off and referring to his academic and military credentials. However, I also find that Stiles discussed wages and other terms and conditions of employment and that this discussion precipitated Colvin's

decision to quit.

No evidence establishes that Stiles acted in a threatening manner and I find that he did not. Additionally, I conclude that the action which got Pesch' attention, and resulted in the decision to discharge Stiles, was Colvin's decision to quit after hearing Stiles discuss wages. Pesch might very well have had some concern about the cohesiveness of the team, but it seems likely that employees quitting after hearing Stiles constituted the event triggering the discharge.

Because the Act protects employee discussion of wages and other terms and conditions of employment, I conclude that Stiles was discharged for protected activity. Therefore, a *Wright Line* analysis is not appropriate.

Rather, the appropriate analytical framework entails determining whether Stiles engaged, during the course of that protected activity, in misconduct sufficiently egregious to remove the protection of the Act. I conclude he did not.

Stiles did not threaten anyone, but rather irritated his coworkers by claiming superior credentials which would protect him from a layoff. Acting boorish may harm team cohesiveness, but it does not constitute egregious misconduct. Moreover, Stiles was not the only person speaking in a loud voice. I do not believe that these oil field workers, sometimes referred to in the testimony as "roughnecks," always carry on conversation in whispers.

It may be noted that were I following a *Wright Line* analysis, I would give little weight to the Respondent's implied claim that it had concerns about Stiles being threatening and intimidating. It disserves the country's combat veterans to jump to such a conclusion and I would reach it only upon evidence more substantial and convincing than present here.

In sum, I conclude that Respondent discharged Stiles, and evicted him from company–owned lodging, because Stiles discussed wages, hours, and working conditions with other employees. Both the discharge and the eviction violated the Act, as alleged in the complaint.

When the transcript of this proceeding has been prepared, I will issue a certification which attaches as an appendix the portion of the transcript reporting this bench decision. This certification also will include provisions relating to the findings of fact, conclusions of law, remedy, order and notice. When that certification is served upon the parties, the time period for filing an appeal will begin to run.

Throughout the hearing, all counsel impressed me with their civility and professionalism, which I truly appreciate.

The hearing is closed.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO
Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT prohibit employees from discussing their wages, hours, or other terms and conditions of employment with others.

WE WILL NOT discharge or otherwise discipline any employee for discussing wages, hours or other terms and conditions of employment, or for engaging in concerted activities with other employees for their mutual aid and protection.

WE WILL NOT evict from company–provided lodging any employee because that person has discussed wages, hours, or other terms and conditions of employment with others or has engaged in union or other protected, concerted activities.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Michael Stiles immediate and full reinstatement to his former position or, if his former position is no longer available, to a substantially equivalent position, furnish to him the same lodging which we provide to other employees on his work crew, and **WE WILL** make him whole, with interest, for all losses he suffered because of our unlawful discrimination against him.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful discharge of Michael Stiles and **WE WILL**, within 3 days thereafter, notify him that the discharge will not be used against him in any way.

TORQUE–IT–UP, LLC and NORTH AMERICAN TUBULAR, LLC, JOINT EMPLOYER AND/OR SINGLE EMPLOYER
(Respondent)

Dated: _____ **By:** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret–ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: ww.nlrb.gov.

819 Taylor Street, Room 8A24, Fort Worth, TX 76102–6178
(817) 978–2921 Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16–CA–140455 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (713)209–4885